UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMMY WILLIAMS, Petitioner and Appellant, vs. WALTER H. DUNBAR, et al., Respondent and Appellee.	NO. 21395

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of California,

ROBERT R. GRANUCCI
Deputy Attorney General

JOHN T. MURPHY
Deputy Attorney General

6000 State Building
San Francisco 94102
Tel: 557-1336

Attorneys for Respondent
and Appellee.

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APPELLEE'S BRIEF

JURISDICTION

The order of the United States District Court for the Northern District of California, dismissing appellant's complaint for damages, in the proceeding entitled Williams v. Dunbar, No. 45119, was issued on August 12, 1966 (CT 96-97). Appellant alleged that the claim arose under Title 42, United States Code sections 1983 and 1985 (the Civil Rights Act). The jurisdiction of the district court was sought under Title 28 United States Code sections 1343 (3) and (4). The jurisdiction of this Court is invoked under Title 28 United States Code sections 1291 and 1915.

STATEMENT OF THE CASE AND OF THE FACTS

Appellant is in the custody of the warden of the California State Prison at San Quentin pursuant to a

judgment pronounced by the Superior Court of Los Angeles County, dated February 19, 1959, in the action entitled People v. Williams, No. 209476, finding appellant guilty, upon his plea of guilty, of assault with a deadly weapon, in violation of section 245 of the California Penal Code (CT 74, 87). He was paroled from state prison on September 5, 1960, which parole was revoked on August 29, 1961 (CT 74, 86).

On July 17, 1962, appellant was again granted parole (CT 74, 86). Appellant executed conditions of parole which included a condition that he cooperate at all times with his appointed parole agent, and that he maintain good behavior and attitude to justify continuing parole (CT 74, 79A). Appellee David L. Harris, a parole officer with the Adult Parole Division of appellee California Adult Authority, was designated appellant's parole agent (CT 75-76).

On August 13, 1962, appellant was arrested by appellee Harris pursuant to section 3056 of the California Penal Code. [1/] (CT 76, 80). Harris reported to the California Adult Authority that appellant had violated a condition of his parole (CT 80-83). Harris' recommendation that parole be cancelled was approved by his supervisor,

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1. Section 3056 provides: "Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the enclosure of the prison."

appellee T. R. Nissen (CT 83). On October 2, 1962, the California Adult Authority formally cancelled the parole (CT 85). He was returned to state prison on October 18, 1962 (CT 86). On November 19, 1962, he was afforded a hearing on the parole violation charge (CT 84). He pled not guilty but was found guilty and parole was revoked (CT 84).

Appellant's complaint alleges, in substance, that he was not afforded due process in the revocation of his parole and that appellees conspired with appellant's wife to deprive him of his liberty. The complaint also alleges claims of defamation, false imprisonment and fraud.

The district court dismissed the complaint on August 12, 1966 (CT 96-97). The court stated:

> "Plaintiff previously filed in this court a petition for a writ of habeas corpus based substantially on the same allegations which appear in his present complaint. On December 14, 1964, this court denied the petition for a writ of habeas corpus because these allegations were not sufficient to indicate any violation of Williams' federal rights. Williams v. California Adult Authority, No. 43101 (N.D.Cal. 1964). See Harris v. Ragen, 81 F.Supp. 608 (N.D.Ill. 1949), aff'd. 177 F.2d 303 (7th Cir.). After careful examination of the complaint (treating it

as claimig different rights on a different basis than the petition for habeas corpus), the court finds no allegation of violation of rights under the Constitution or statutes of the United States. Therefore, plaintiff states no cause of action under 42 U.S.C. § 1983 nor under 42 U.S.C. § 1985. Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963), cert. den. 376 U.S. 920." (CT 97).

The court did not pass on the merits, if any, of appellant's claims of defamation, false imprisonment and fraud (CT 97). The court stated that these matters might be raised under state law in the state courts (CT 97).

On August 25, 1966, appellant filed a notice of appeal (CT 116-132).

APPELLANT'S CONTENTIONS

1. The district court erred in dismissing the complaint where the appellant can prove facts in support of his claim which would entitle him to relief.

2. The district court committed procedural errors in dismissing the complaint.

SUMMARY OF APPELLEES' ARGUMENT

I. The actions of appellees Harris and Nissen in recommending the cancellation and revocation of appellant's parole did not violate any federal constitutional provision or any federal law.

II. The action of the California Adult Authority in cancelling and revoking appellant's parole did not violate any federal constitutional provision or federal law.

III. Appellant's allegations of defamation, false imprisonment and fraud did not raise any issues cognizable under the Federal Civil Rights Act.

IV. There were no procedural defects in the order of dismissal.

ARGUMENT

I.

THE ACTIONS OF APPELLEES HARRIS AND NISSEN IN RECOMMENDING THE CANCELLATION AND REVOCATION OF APPELLANT'S PAROLE DID NOT VIOLATE ANY FEDERAL CONSTITUTIONAL PROVISION OR ANY FEDERAL LAW

On June 6, 1962, appellee California Adult Authority granted appellant the privilege of parole (CT 79). On July 16, 1962, appellant duly executed an agreement of parole, and on the following day was released from physical custody into the constructive custody of the Adult Parole Division (CT 79). He was placed under the supervision of the Huntington Park District Office where appellee T. R.

Nissen was supervisor and appellee David L. Harris was parole agent (CT 86).

On August 13, 1962, appellant's wife reported that appellant had gone "berserk" and had destroyed personal property in her home (CT 80). She feared for her life (CT 80). Acting on this information, Harris arrested appellant pursuant to the authority conferred upon him by California Penal Code section 3056 (CT 80). The next day Harris checked the wife's home very closely and confirmed the fact that extensive damage and destruction had occurred (CT 80-81). He also contacted appellant who denied destroying any part of the home but admitted that he was in the house at the time of the incident, was aware of the damage done, and did not report the matter to the police (CT 81). After completing the investigation, Harris recommended cancellation of the parole (CT 82). Nissen approved the recommendation (CT 83).

Appellant, in his complaint, claimed that his constitutional rights had been infringed by the actions of Harris and Nissen. Apparently, appellant demands that the recommendations of the parole officers be based upon the results of some formal inquiry of an adversary nature, or some judicial determination of his guilt to the charge of destroying his wife's property.

In the absence of a statute requiring a hearing, there is no constitutional right to a hearing on the breach

of conditions of parole or probation. Escoe v. Zerbst. 205 U.S. 490, 492 (1935); Linton v. Cox, 358 F.2d 859, 862 (10th Cir. 1966). There is no constitutional infirmity in the retaking of a parolee who is accused of a violation of parole. Richardson v. Markley, 339 F.2d 967, 969 (7th Cir. 1965). Parole is a matter of grace and not of right. Hyser v. Reed, 318 F.2d 225, 233 (D.C. Cir. 1963). In Jones v. Cunningham, 371 U.S. 236, 242 (1963), the court recognized the power of a parole officer to confine a parolee he believes has a violated a term or condition of parole.

In the instant case, parole agent Harris thoroughly investigated the incident which gave rise to the parole violation charge, including in his investigation an interview with appellant (CT 80-82). In his final evaluation, Harris concluded that appellant's failure to report the incident to police demonstrated his poor attitude and lack of cooperation. In addition, there was strong circumstantial evidence that appellant had, in fact, inflicted the damage on his wife's property. The assertions that Harris ignored appellant's denial of guilt or did not consider the wife's veracity, do not show that Harris violated any constitutional right of appellant. The conditional liberty of parolees is an attempt at rehabilitation and the progress of that attempt should be measured "by the considered judgment of those who make it their professional

business." Jones v. Rivers, 338 F.2d 862, 874 (4th Cir. 1964).

II.

THE ACTION OF THE CALIFORNIA ADULT AUTHORITY IN CANCELLING AND REVOKING APPELLANT'S PAROLE DID NOT VIOLATE ANY FEDERAL CONSTITUTIONAL PROVISION OR FEDERAL LAW

Upon the recommendation of the Adult Parole Division, the California Adult Authority cancelled appellant's parole and he was returned to state prison (CT 85-86). At state prison he was afforded a hearing on the charge against him and was found guilty (CT 84). Parole was revoked (CT 84).

In his complaint, appellant asserted a right to an adversary hearing on the issue of parole violation, apparently with the right to counsel, the right to present witnesses, and the right to confront the witnesses against him.

Where a hearing is granted, as in appellant's case, such hearing need not be converted into an adversary proceeding. Hyser v. Reed, supra, 318 F.2d 225, 233 (D.C. Cir. 1963), cert. denied 375 U.S. 957. Parole is a privilege and not a right, and the revocation of parole, like the granting of it in the first instance, does not require a full dress trial with the right to counsel, the right to summon witnesses, and the right to confront witnesses. United States v. Kenton, 190 F. Supp. 689, 691 (D.Conn. 1960

The right to counsel is clearly not applicable. In Washington v. Hagen, 287 F.2d 332, 334 (3d Cir. 1960), cert. denied 366 U.S. 970 (1961), the court said: "So long as the judgment is fairly and honestly exercised we think there is no place for lawyer representation and lawyer opposition in the matter of revocation of parole." See also, Martin v. United States Board of Parole, 199 F. Supp. 542, 543 (D.C. 1961); Hock v. Hagen, 190 F. Supp. 749, 751 (M.D. Penna. 1960); Lopez v. Madigan, 174 F.Supp. 919 (N.D. Cal. 1959).

A parolee has no constitutional right to present witnesses at a hearing, or to confront his accusers and to cross-examine them. Gibson v. Markley, 205 F.Supp. 742, 743 (S.D. Ind. 1962); Poole v. Stevens, 190 F. Supp. 938, 939 (E.D. Mich. 1960). Here, appellant was afforded an administrative hearing and there is no basis for asserting that that hearing was inadequate or unfair. See Collins v. Klinger, 332 F.2d 54, 58 (9th Cir. 1964).

Appellant's contention that his reconfinement was unlawful because of the time lapse between his arrest (August 13, 1962) and the date of the official revocation (November 19, 1962) is without merit. Letellier v. Taylor, 348 F.2d 893, 894 (10th Cir. 1965).

In People v. Ragen, 81 F.Supp. 608, 610 (N.D. Ill. 1949), affirmed 177 F.2d 303 (7th Cir. 1949), the court stated:

"The administration of the parole law is the exercise through an executive branch of the government, of the state's power to keep safely, supervise and discipline its prisoners. Such matters are not judicial, but are matters of prison discipline. Quite obviously, then, a court has no authority to interfere unless the administrative body has acted arbitrarily or capriciously. And this power is even more stringently limited where a federal court is called upon to review the acts and decisions of an administrative agency of a sovereign state."

Since appellant concedes that his commitment is valid and since he is presently serving his sentence pursuant to that commitment, his attack on the validity of the order revoking his parole presented no federal question which might have entitled him to damages under the Civil Rights Act. See In re Costello, 262 F.2d 214 (9th Cir. 1958).

III.

APPELLANT'S ALLEGATIONS OF DEFAMATION, FALSE IMPRISONMENT AND FRAUD DID NOT RAISE ANY ISSUES COGNIZABLE UNDER THE FEDERAL CIVIL RIGHTS ACT

Appellant urged in his complaint that the appellees, by acting to revoke his parole, defamed his character, committed fraud and deceit, and caused his false imprisonment. The district court, without reaching the merits of

these claims, properly held that they were questions for the civil courts of the state and not matters upon which the federal courts had jurisdiction under the Civil Rights Act (CT 97). See Agnew v. City of Compton, 239 F.2d 226, 232 (9th Cir. 1957).

IV.

THERE WERE NO PROCEDURAL DEFECTS IN THE ORDER OF DISMISSAL

Appellant's brief attempts to raise a series of procedural questions. They may be disposed of briefly:

1. Can the district court dismiss the complaint on its own motion without holding a hearing?

This is not an issue because the complaint was dismissed on the motion of appellees and a hearing was held.

2. Can the district court dismiss the complaint without leave to amend?

Yes. Bonanno v. Thomas, 309 F.2d 320 (9th Cir. 1962)

3. Can the district court dismiss the complaint without first viewing the reply submitted by appellant in opposition to the motion to dismiss?

The motion to dismiss was noticed on July 25, 1966 (CT 72). It was heard on August 8, 1966 (CT 72). The complaint was dismissed on August 12, 1966 (CT 96-97). A note on the order of dismissal indicates that copies were mailed that date (CT 96). A reply to the motion to dismiss, dated August 15, 1966, was filed by appellant on

August 18, 1966 (CT 98-113). It is evident that appellant had ample time to reply prior to the hearing and prior to the issuance of the order of dismissal. He made no application for an extension of time.

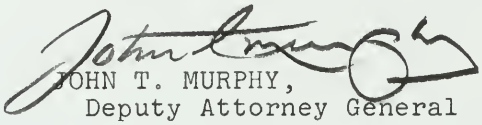
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court dismissing the complaint for damages should be affirmed.

Dated: December 5, 1966.

THOMAS C. LYNCH, Attorney General
of California,

ROBERT R. GRANUCCI,
Deputy Attorney General



JOHN T. MURPHY,
Deputy Attorney General

Attorneys for Appellees.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: December 5, 1966.

JOHN T. MURPHY
Deputy Attorney General